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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA, *Ex Rel.* MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, on their own behalf,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief on Behalf of Respondents Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher

WHITNEY NORTH SEYMOUR,
Counsel for Bausch & Lomb Optical Company, et al.

SIMPSON THACHER & BARTLETT,
Of Counsel.

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Question Presented 2

Statutes and Rule Involved 2

Statement 5

Summary of Argument 10

I. The decision of this Court in United States *ex rel.* Marcus *v.* Hess is clearly distinguishable on its facts 12

II. The courts below properly granted summary judgment to these respondents since petitioners, in the face of respondents' affidavits, failed to present evidence which would give rise to a genuine issue as to any material facts, and respondents were entitled to judgment as a matter of law 13

(a) The affidavits filed by petitioners in opposition to the motion for summary judgment are totally insufficient to raise genuine issues of fact 15

(b) The record shows no competitive bidding requirement and no thwarting thereof; the exhibits raise no genuine issue of fact .. 22

(c) On the facts of record respondents were entitled to judgment as a matter of law 29

III. The Government's Brief as *amicus curiae* in support of the petition poses a question which on this record is hypothetical and the criticism of the construction by the court below of R. S. §5438 as requiring deceit appears to be unfounded 37

(a) The statute was designed and passed to prevent deceitful practices, to prevent "cheating" the Government; deceit is the essence of the offense 38

(b) The statute has been construed as being limited to deceitful practices 39

(c) The statute should be strictly construed and not set at large or treated as an additional sanction for the anti-trust laws 40

Conclusion 47

Appendix 48

Table of Cases Cited

Abbey Sales Company, Inc. *v.* Johnson, 262 App. Div. 1021, 30 N. Y. Supp. (2d) 295 (1941) 21

A. B. Small Co. *v.* American Sugar Refining Co., 267 U. S. 231, 239 (1925) 42

A. B. Small Co. *v.* Lamborn & Co., 267 U. S. 248, 252 (1925) 36

PAGE

Allen *v.* Radio Corporation of America, 47 F. Supp. 244 (D. Del., 1942).. 19
Altman *v.* Curtiss-Wright Corporation, 124 F. (2d) 177, 180 (C.C.A. 2, 1941) 14

Banco de Espana *v.* Federal Reserve Bank, 114 F. (2d) 438 (C.C.A. 2, 1940) 20
Barnsdall Refining Corp. *v.* Birnamwood Oil Co., 32 F. Supp. 308 (E. D. Wis., 1940) 20
Barnsdall Refining Corp. *v.* Birnamwood Oil Co., 32 F. Supp. 314, 315, 316 (E. D. Wis., 1940)..... 36
Belote *v.* O'Brian's Adm'r, 20 Fla. 126, 138 (1883)..... 21
Benson *v.* Crane, 257 Ill. App. 71, 91 (1930)..... 34
Boerner *v.* United States, 26 F. Supp. 769 (E. D. N. Y., 1939)..... 20
Bridgeman *v.* United States, 140 Fed. 577, 594 (C.C.A. 9, 1905)..... 40
Buckeye Powder Company *v.* E. I. DuPont de Nemours Powder Company, 248 U. S. 55, 63 (1918)..... 21

Carroll *v.* Paramount Pictures, 3 F. R. D. 95, 97 (S. D. N. Y., 1942).. 13
City of Oakland *v.* California Construction Co., 15 Cal. (2d) 573 (1940) 29
Cohen *v.* 11 West 42nd Street Inc., 115 F. (2d) 531, 532 (C.C.A. 2, 1940) 13
Commonwealth *v.* Exler, 243 Pa. 155, 89 Atl. 968 (1914)..... 44
Commonwealth *v.* Wells, 110 Pa. 463, 468, 1 Atl. 543 (1885)..... 44

Dr. Miles Medical Co. *v.* Park & Sons Co., 220 U. S. 373, 402 (1911).. 34
D. R. Wilder Mfg. Co. *v.* Corn Products Refining Co., 236 U. S. 165, (1915) 36

Edward B. Marks Music Corp. *v.* Stasny Music Corp., 4 Fed. Rules Serv. 773 (S. D. N. Y., 1941).....13, 20
Excelsior Wooden Pipe Company *v.* Pacific Bridge Company, 185 U. S. 282 (1902) 34

Fishman *v.* Teter, 133 F. (2d) 222, 223 (C.C.A. 7, 1943)..... 13
Fletcher *v.* Krise, 120 F. (2d) 809 (App. D. C., 1941), cert. den. 314 U. S. 608 (1941) 13
Fox *v.* Johnson & Wimsatt Inc., 31 F. Supp. 64, aff'd 127 F. (2d) 729 (App. D. C., 1942)..... 20

Henderson *v.* Glosser, 46 F. Supp. 458 (W. D. Pa., 1942)..... 13
Herndon *v.* Lowry, 301 U. S. 242, 261 (1937)..... 41
Hesser-Milton-Renahan Coal Co. *v.* La Crosse Fuel Co., 114 Wis. 654, 660, 90 N. W. 1094, 1096 (1902)..... 21
Hummel *v.* Wells Petroleum Co., 111 F. (2d) 883 (C.C.A. 7, 1940)..... 20

John D. Park & Sons *v.* Hartman, 153 Fed. 24, 30 (C.C.A. 6, 1907).... 34

Kettenbach *v.* United States, 202 Fed. 377, 383 (C.C.A. 9, 1913)..... 21

Littlefield *v.* Perry, 21 Wall. 205 (1874)..... 34

Manning *v.* Galland-Henning Pneumatic Malting Drum Mfg. Co., 141 Wis. 199, 203, 204, 124 N. W. 291, 292, 293 (1910)..... 34
McMullen *v.* Hoffman, 174 U. S. 639 (1899)..... 29
Miller *v.* Miller, 122 F. (2d) 209 (App. D. C., 1941)..... 13

Person *v.* United States, 112 F. (2d) 1 (C.C.A. 8, 1940), cert. den. 311 U. S. 672 20
Prudential Ins. Co. of American *v.* Goldstein, 43 F. Supp. 767, 768 (E. D. N. Y., 1942) 14

Richard *v.* Credit Suisse, 242 N. Y. 346, 350 (1926)..... 14
Roscoe Lumber Co. *v.* Standard Silica Cement Co., 62 App. Div. 421, 70 N. Y. Supp. 1130 (1901)..... 21

PAGE

Seim *v.* Krause, 13 S. D. 530, 83 N. W. 583 (1900) 21
Seven Cases *v.* United States, 239 U. S. 510, 517 (1916) 41
Seward *v.* Nissen, 2 F. R. D. 545 (D. Del., 1942) 13, 14, 20
Sherrill *v.* Alabama Appliance Co., Inc., 240 Ala. 46, 197 So. 1 (1940) .. 34

Town of River Junction, *et al. v.* Maryland Casualty Co., 110 F. (2d) 278 (C.C.A. 5, 1940) 20
Triangle Conduit & Cable Co. *v.* Nat. Elec. Products Corp., 38 F. Supp. 533 (D. Del., 1941), rev'd on other grounds, 125 F. (2d) 1008 (C.C.A. 3, 1942) 9
Twin Ports Oil Co. *v.* Pure Oil Co., 26 F. Supp. 366 (D. Minn., 1939), aff'd 119 F. (2d) 747, 314 U. S. 644 20

United States *v.* Adams Exp. Co., 119 Fed. 240 (S. D. Iowa, E. D., 1902) 21
United States *v.* Cohen Grocery Co., 255 U. S. 81, 89 (1921) 41, 42
United States *v.* Cooper Corp., 312 U. S. 600, 606 (1941) 45
United States *v.* Goggin, 1 Fed. 49 (C. C. E. D. Wis., 1880) 39
United States *v.* Green, 26 Fed. Cas. 32, No. 15,257 (C. C. E. D. Wis., 1879) 39
United States *v.* Kessler, 43 F. Supp. 408, 412 (E. D. N. Y., 1942) 21
United States *v.* McKay, 45 F. Supp. 1001, 1002 (E. D. Mich. S. D., 1942) 21
United States *v.* Newbury Mfg. Co., 123 F. (2d) 453 (C.C.A. 1, 1941) .. 9
United States *ex rel.* Brensilber, *et al. v.* Bausch & Lomb Optical Company, *et al.*, 131 F. (2d) 545 (C.C.A. 2, 1942) 1
United States *ex rel.* Edelstein *v.* Brussell Sewing Machine Co., Inc. (S. D. N. Y., 1943) so far unreported and printed as Appendix C herein 42
United States *ex rel.* Marcus *v.* Hess, 317 U. S. 537 (1943) 9, 10, 12, 25, 38, 39, 40, 41, 42, 44

Welch *v.* T. W. Warner Co., 47 F. (2d) 231 (S. D. N. Y., 1930), aff'd 47 F. (2d) 232 (C.C.A. 2, 1931) 9
Whitaker *v.* Coleman, 115 F. (2d) 305, 307 (C.C.A. 5, 1940) 14

Statutes

Act of March 2, 1901, c. 803, 31 Stat. 895, 905 (10 U.S.C. Sec. 1201) 26
Act of June 30, 1902, c. 1328, 32 Stat. 507, 514 (10 U.S.C. Sec. 1201) 26
Act of May 11, 1908, c. 163, 35 Stat. 106, 125 (10 U.S.C. Sec. 1199) 26
Act of June 30, 1914, c. 130, 38 Stat. 392, 399 (34 U.S.C. Sec. 568) 27
Act of June 30, 1921, c. 33, 42 Stat. 68, 90 27
Act of June 30, 1922, c. 253, 42 Stat. 716, 742-3, 754 27
Act of February 28, 1931, c. 326, 46 Stat. 1431, 1450 27
Act of June 30, 1932, c. 318, 47 Stat. 421, 441-2 27
Act of March 3, 1933, c. 213, 47 Stat. 1521, 1540 27
Act of March 3, 1933, c. 212, 47 Stat. 1489, 1520 (41 U.S.C. Sec. 10a) .. 27
Act of March 15, 1934, c. 69, 48 Stat. 403, 421 27
Act of June 24, 1935, c. 291, 49 Stat. 398, 418 27
Clayton Act, Section 5 21
Revised Statutes:
Section 3490 ..... 2, 3, 5, 40
Sections 3491-3 ..... 2, 3, 5
Section 3494 ..... 2, 3, 5, 32
Section 3721 26
Section 5438 ..... 2, 3, 5, 40
Sherman Anti-Trust Act, Section 1 5
Wilson Tariff Act, Section 73 5

Federal Rules of Civil Procedure

	PAGE
R. C. P. 12(b)	7
R. C. P. 15(a)	8,9
R. C. P. 56	3, 4, 10, 13, 15, 19
R. C. P. 56(e)	4, 7, 10, 16, 19, 20, 22

Miscellaneous

Annual Reports of the Navy Department for 1924	27
Baker, Optical Instruments in the Fighting Services	27
Clark, Summary Judgments	15
Cleary, Range Finders and Range Finding	32
Congressional Record (76th Congress, 1st Sess.)	44
Congressional Record (78th Congress, 1st Sess.)	45
Government Contracts, Report No. 2, 37th Congress, 2nd Sess. (1862)	38
Government Contracts, Reports Nos. 49 and 50, 37th Congress, 3rd Sess. (1863)	38
H. Rpt. No. 263 and H. R. No. 1203, 78th Congress, 1st Sess.	45
Opinions of the Attorney General (U. S.), Vol. 21	2
Ordnance Dept., The Manufacture of Optical Glass and of Optical Systems	33
S. 2719, 76th Congress, 1st Sess.	44
Shientag, Summary Judgment	18
The United States Government Manual, Fall 1942	26
Webster's New International Dictionary, 2d Ed.	26

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BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS BAUSCH & LOMB OPTICAL COMPANY, M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER

Opinion Below

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 267-269) is reported in 131 F. (2d) 545.

Jurisdiction

The judgment of the Circuit Court of Appeals to be reviewed was entered November 23, 1942 (R. 270). Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. Certiorari was granted May 3, 1943 (R. 271).

Question Presented

Whether, upon the record in this case, the court below erred in unanimously affirming a summary judgment for respondents in an action brought by informers under §§3490-3494 and 5438 of the Revised Statutes.

Statutes and Rule Involved

This action was instituted under R. S. §3490, which incorporates by reference certain of the provisions of R. S. §5438 as they appeared in 1874, when the act establishing the Revised Statutes was approved. Both of these sections are contained in what is generally known and referred to as the Informer's Act, R. S. §§3490-3494, 5438, and provide as follows:

Revised Statutes, §3490:

> "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may

have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Revised Statutes, §5438:

"Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars."

The entire Informer's Act, including Revised Statutes, §§3491-3494, is printed in Appendix A.

Since this case involves the correctness of summary judgment for respondents, the pertinent provisions of Rule 56 of the Federal Rules of Civil Procedure are set forth below:

RULE 56

Summary Judgment

* * *

"b. *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

c. *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

* * *

e. *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

Rule 56 is quoted in its entirety in Appendix B, *infra*, page 52.

Statement

This is a civil action for damages and penalties alleged to aggregate more than $40,000,000, brought by two lawyers on their own behalf and on behalf of the United States under the Informer's Act (R. S. §§3490-3494; 5438, unamended). It was instituted a year and a half after the final disposition, in July, 1940, of certain criminal and civil proceedings which had been brought by the Anti-Trust Division of the Department of Justice. The Government had claimed that Bausch & Lomb, Carl Zeiss of Jena, Germany (not sued herein), and the other defendants herein had participated in a conspiracy and combination restraining foreign commerce in violation of Section 1 of the Sherman Anti-Trust Act* and in restraint of import trade in violation of Section 73 of the Wilson Tariff Act.**

Those charges were based on certain agreements entered into between Bausch & Lomb and Carl Zeiss of Jena in 1921 and 1925, and a superseding agreement made in 1926, under which Bausch & Lomb acquired the exclusive license and right to manufacture and sell military optical instruments in the United States under the inventions and patents of Carl Zeiss of Jena and assurance of its technical assistance and cooperation in scientific research for improvements and inventions in that field (R. 157-167). Zeiss was to receive a royalty on all military optical instruments sold by Bausch & Lomb (R. 158). The Government did not charge either that Bausch & Lomb had a monopoly in the manufacture and sale of military optical instruments in the United States or to the United States

* Act of July 2, 1890, Ch. 647, §1, 26 Stat. 209, 15 U.S.C., §1.

** Act of August 27, 1894, Ch. 349, §73, 28 Stat. 570; February 12, 1913, Ch. 40, 37 Stat. 667, 15 U.S.C., §8.

Government, or that the purpose or intent of the agreements was to give it such a monopoly.

The anti-trust proceedings terminated in pleas of *nolo contendere,* the payment of fines and the entry of a consent decree (R. 243-248), which expressly provided that no testimony had been taken; that the defendants consented to the entry of the decree without any findings of fact "upon condition that neither such consent nor this decree shall be evidence, admission or adjudication that they have violated any statute of the United States * * *" (R. 243).* Government counsel in charge of those proceedings, and under whose personal supervision the Grand Jury investigation preceding them was made, stated in open court at the time of acceptance of the pleas, in response to a question by the Court, that no charge of fraud was involved in connection with the acts complained of in the indictment (R. 24). The indictment, the Government's bills of particulars and exhibits, the equity complaint, and the consent decree are in the record (R. 86-248) and were before the courts below.

Petitioners have not denied, and the record clearly shows, that their case is based solely on the court record in the anti-trust proceedings. Yet, when they served their complaint (R. 3-10), it contained general charges of fraud predicated upon a distorted version of the provisions of the written agreements which were matters of record in that proceeding.

This misconstruction, which petitioners now claim to have been merely inadvertent, permeated the complaint. It was charged that under the agreements Bausch & Lomb agreed to and did add 20% to its prices on sales by it of

* These respondents settled those proceedings largely because they were too preoccupied with the increasing demands of our armament program to prepare for and participate in a trial (R. 23-24, 30).

military optical instruments to the United States Government, and agreed to and did pay the amount of such mark-up to Carl Zeiss of Jena. (Compare R. 25-27 and 233-236 with R. 5-8 and 221-222.) Nor was this the only distortion of facts of record to be found in that pleading.*

Desiring to obtain immediate and definitive relief against the false charges of fraud which had been made, these respondents moved for an order dismissing the complaint for failure to state a cause of action under the statute and for summary judgment.** In conformity with the explicit requirements of Rule 56(e) of the Federal Rules of Civil Procedure (Appendix B, p. 53) respondents submitted affidavits in support of the motion (R. 17-33), based on personal knowledge, in which the affiants set forth facts showing that there had been no fraud upon, or submission of fraudulent claims to, the United States Government. The affidavits showed the critical importance of immediate disposition of the case to avoid interruption of work for the Government. The petitioners opposed with affidavits which clearly failed to meet the requirements of Rule 56(e), contained no facts based upon knowledge in support of the complaint, and merely served to bring the anti-trust proceedings file into the record (R. 64-77).

Just before the return day of the motion, petitioners served a partially renovated complaint (R. 78-85), withdrawing the above noted false charges. This document merely plagiarized the Government's charges in the anti-

* The complaint contained other distortions of the facts of record in the anti-trust proceedings; for example, that the agreements in question (1) were made between respondent Bausch & Lomb and respondent Carl Zeiss, Inc., and (2) that the individual respondents were officers and directors not only of Bausch & Lomb but also of Carl Zeiss, Inc.

** These respondents also attacked the venue of the action, but requested the District Court to decide the case on the merits. Neither of the courts below passed upon the venue question, which, however, has not been waived and is reserved. See Rule 12(b) of the Federal Rules of Civil Procedure (Appendix B). We do not argue it here because we assume that the Court will not wish to pass upon a question not decided below.

trust proceedings and repeated general charges of fraud in an attempt to bring the case under the Informer's Act.

Respondents took immediate steps to forestall this attempt to delay final decision. The purported amended complaint was rejected because it was an untimely amendment as of course under Rule 15(a) of the Federal Rules of Civil Procedure (R. 51, 54-56; Appendix B, p. 51), inasmuch as the respondents, by moving for summary judgment, had already interposed a "responsive pleading" within the fair meaning of that Rule. Respondents then moved for an order declaring the purported amended complaint a nullity and not a proper amendment as of course under Rule 15(a); and, in addition, that leave to amend in accordance therewith, if requested, should be denied. Respondents asked, however, that the purported amended complaint be considered by the District Court on motion for summary judgment as an admission by petitioners of the falsity of the charges in the original complaint. In the event that amendment were permitted, respondents in the alternative renewed the motion to dismiss and for summary judgment (R. 46-56).

The District Court in one judgment dismissed the original complaint and granted summary judgment for all respondents (R. 259-262). In a separate order, it granted respondents' motions with respect to the attempted amendment, declared it to be a nullity, and denied leave to amend in accordance therewith (R. 254-8). Not having permitted amendment, it did not pass directly upon respondents' motions to dismiss the amended complaint, although its denial of amendment was based upon the view that it did not state a cause of action (R. 258). Petitioners appealed from the judgment and the order of the District Court. On November 5, 1942, the Circuit Court of Appeals unanimously affirmed, *per curiam*, the orders and judgment of the District Court, being of the

opinion that whether amendment should have been permitted or not, or whether or not the proposed amended complaint, taking it as it read, stated a cause of action, summary judgment for defendants was required (R. 267-269).*

On January 18, 1943, this Court handed down its decision in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537 (1943). Thereupon, these petitioners, adopting a new theory of fraud, sought certiorari.

The Solicitor General filed a brief *amicus* in support of the petition apparently because Government counsel regarded the construction of the statute by the court below (as using fraud in the accepted sense of deceit) as being too narrow. The brief was, naturally, concerned with what the court below said; it did not attempt to analyze this record and consider what the court, in fact, did in affirming summary judgment. As a result, the brief expressed apprehension as to possible disposition of cases quite unlike this one, a matter which should wait until they arise.

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*While the Circuit Court of Appeals found it unnecessary to decide whether the time for petitioners to amend as of course had expired, since in any event summary judgment for respondents was required, the District Court appears to have been correct in holding that the attempted amendment was a nullity because respondents, by moving for summary judgment, had interposed a "responsive pleading" to the complaint within the meaning of Rule 15(a), after which petitioners lost their right to amend as of course. In so ruling, the District Court followed the only decision on the point, *Triangle Conduit & Cable Co.* v. *Nat. Elec. Products Corp.*, 38 F. Supp. 533 (D. Del., 1941), rev'd. on other grounds, 125 F. (2d) 1008 (C.C.A. 3, 1942). The reason for limiting the right to amend without leave of court after such a motion is obvious; plaintiff should then meet the motion on the merits and should not be permitted to delay consideration by *ex parte* amendment. If he can show good grounds for amendment, the application should be made to the court, which can consider them. Compare *United States* v. *Newbury Mfg. Co.*, 123 F. (2d) 453 (C.C.A. 1, 1941), which deals, however, with a motion to dismiss rather than a motion for summary judgment. Where only a motion to dismiss is made and defendant has not invoked a scrutiny of the underlying facts, reason may well exist for permitting correction of the pleading without application to the court. In holding that amendment should be denied when the proposed amendment is insufficient, the District Court was on sound ground. See *Welch* v. *T. W. Warner Co.*, 47 F. (2d) 231 (S.D.N.Y., 1930), aff'd. 47 F. (2d) 232 (C.C.A. 2, 1931). It is unnecessary for this Court to pass on these questions since, as the court below held, they are academic because summary judgment for respondents was correct. The argument that neither the original nor the amended complaint was sufficient, even on its face, is contained in Point I of our Brief in Opposition, to which reference is respectfully made.

Summary of Argument

The recent decision of this Court in *U. S. ex rel. Marcus* v. *Hess, supra,* is clearly distinguishable on its facts from this case.

The court below was clearly right in affirming summary judgment for these respondents, and that disposes of the case. Respondents' motion for summary judgment, made under Rule 56 of the Federal Rules, unlike a demurrer, required the court to consider not mere formal allegations of pleadings but the admissible evidence, if any, in support of those allegations. The respondents' affidavits in support of the motion, conformed to the explicit requirements of Rule 56(e) and showed that there was no basis for petitioners' claims that Bausch & Lomb had violated any of the provisions of the Informer's Act.

The counter-affidavits filed by petitioners failed to meet the requirements of Rule 56(e) and were insufficient to establish the existence of a triable issue of fact. Such affidavits merely incorporated by reference the court record in anti-trust proceedings. Neither the indictment, the bills of particulars nor the equity complaint and consent decree in the anti-trust proceedings constituted admissible evidence under Rule 56(e). Correspondence attached to the Government's bills of particulars did not support petitioners' claims. There was no admissible evidence of any false bids or claims by Bausch & Lomb in any dealings with the United States nor was there any evidence that "protective offers" had ever been used in such dealings.

This record does not support petitioners' claim that the agreements between Zeiss and Bausch & Lomb involved a conspiracy to thwart the competitive bidding process. It does not appear that Ziess was a potential competitive bidder or that military optical instruments

were subject to competitive bidding requirements. Facts which may be noticed indicate the contrary. The 1921 and 1925 agreements were superseded and revoked by the 1926 agreement, and no evidence in the record, dealing with the period either before or after 1926, shows any fraud on the Government. The court below did not interpret the agreements as thwarting competitive bidding. It took the view that, at most, the agreements might reflect an anti-trust law violation and that this, in itself, could not make claims by Bausch & Lomb against the United States fraudulent. Thus on this record, the court below was bound to affirm summary judgment for these respondents.

Since this case does not involve competitive bidding, the problem with which the Solicitor General was concerned in his brief *amicus* is hypothetical and should not be decided here.

The construction of the Informer's Act by the court below as requiring deceit was correct. It is supported by legislative history, the normal meaning of the words used, previous judicial decision and other considerations.

A broader construction, setting the statute at large, so that it might apply retrospectively to transactions not within its fair meaning, would not only engender doubts of its validity but introduce undesirable elements of uncertainty into dealings with the Government. The suggestion that the statute should be extended to provide an additional sanction for the anti-trust laws is one which should be addressed to Congress.

POINT I

The decision of this Court in *U. S. ex rel. Marcus* v. *Hess* is clearly distinguishable on its facts.

Petitioners rely heavily upon the recent decision of this Court in *U. S. ex rel. Marcus* v. *Hess,* 317 U. S. 537 (1943), a decision which has no application to the facts of this case.

It will be recalled that in *Marcus* v. *Hess* a jury had found the defendants guilty of engaging in a conspiracy whereby they had effectively eliminated all possible competition in competitive bidding on PWA projects. Although the Circuit Court was of the opinion that a fraud was involved, it nevertheless concluded that the fraud had not been perpetrated upon the United States Government. This Court reversed, holding that fraudulent claims had been submitted to the United States Government within the meaning of the statute.

Since no such problem is involved in this case, it remains only to consider whether the facts are sufficiently similar as to warrant the conclusion that there was fraud in this case within the meaning of the Informer's Act.

In its opinion in *Marcus* v. *Hess,* this Court pointed out the critical facts of that case when it said, at page 543:

> "* * * The jury and both courts have found that the contracts were obtained by a successfully executed conspiracy to remove all possible competition from 'competitive bidding.' The bidding itself was a federal requirement; * * * and many if not most of the respondents certified that their bids were 'genuine and not sham or collusive.'
>
> * * * * * * *

> • • • the respondents thus caused the Government to pay claims • • • under contracts found to have been executed as the result of the fraudulent bidding."

In the face of a motion for summary judgment and the affidavits of these respondents, petitioners have failed to set forth any admissible evidence tending to prove that this case comes within any of those facts.

POINT II

The courts below properly granted summary judgment to these respondents since petitioners, in the face of respondents' affidavits, failed to present evidence which would give rise to a genuine issue as to any material fact, and respondents were entitled to judgment as a matter of law.

The crucial question is whether the courts below properly granted summary judgment to these respondents. If that determination was correct, as we contend, nothing remains of this case.

Unlike a demurrer, which assumes the truth of the facts properly pleaded and merely tests their legal sufficiency, the motion for summary judgment, brought pursuant to Rule 56 of the Federal Rules of Civil Procedure (Appendix B, p. 52), pierces the formal issues raised by the pleadings* or the allegations of the complaint when a defendant has moved before answer,** and calls into

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* *Fletcher* v. *Krise*, 120 F. (2d) 809 (App. D.C. 1941), cert. den. 314 U. S. 608 (1941); *Fishman* v. *Teter*, 133 F. (2d) 222, 223 (C.C.A. 7, 1943); *Miller* v. *Miller*, 122 F. (2d) 209 (App. D.C. 1941); *Edward B. Marks Music Corp.* v. *Stasny Music Corp.*, 4 Fed. Rules Serv. 773 (S.D.N.Y. 1941).

** *Seward* v. *Nissen*, 2 F.R.D. 545 (D.C. Del., 1942); *Henderson* v. *Glosser*, 46 F. Supp. 458 (W.D. Pa., 1942). See also: *Cohen* v. *11 West 42nd Street Inc.*, 115 F. (2d) 531, 532 (C.C.A. 2, 1940); *Carroll* v. *Paramount Pictures*, 3 F.R.D. 95, 97 (S.D.N.Y., 1942).

question the existence of a *genuine* issue as to any *material* fact. In the absence of such an issue, the case does not merit a trial but is determinable as a matter of law.

The purpose of summary judgment was succinctly described by Judge Cardozo for the New York Court of Appeals:

> "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial." (*Richard* v. *Credit Suisse*, 242 N. Y. 346, 350 (1926).)

Thus, it provides a method of determining on motion spurious or unfounded claims and those otherwise lacking in merit without the delay and expense which would be incident to a trial. *Altman* v. *Curtiss-Wright Corporation*, 124 F. (2d) 177, 180 (C.C.A. 2, 1941); *Prudential Ins. Co. of America* v. *Goldstein*, 43 F. Supp. 767, 768 (E.D.N.Y., 1942).

The motion affords a preliminary analysis and evaluation of the evidence in the possession of both sides. *Seward* v. *Nissen*, 2 F.R.D. 545 (D. Del., 1942). As was said in *Whitaker* v. *Coleman*, 115 F. (2d) 305, 307 (C.C.A. 5, 1940):

> "Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."

This outline of the nature of the summary judgment procedure is necessary since petitioners and Government counsel (in their brief *amicus* in support of the petition)

argued the case as if it were primarily concerned with a demurrer. As a result of this misconception, petitioners rely upon allegations in the so-called amended complaint and assume others which do not even appear there, all of which are unsupported by admissible evidence. Then, assuming their truth, they seek to support the legal sufficiency of such allegations. This approach to the record disregards the true nature of the proceedings below and thus obscures the question before the Court.

The court below was fully aware of the fact that it was deciding a summary judgment case, a procedure much used in the State and Federal Courts of New York.* Its observation that even if the amended complaint stated a cause of action, taking it as it read, nevertheless summary judgment was required, attests that facts, not unsupported allegations, were the subject matter of its scrutiny. The substance of the decisions below, in strict accordance with the requirement of Rule 56, is that in the face of respondents' proofs no admissible evidence was adduced by petitioners which presented any genuine material issue of fact, and respondents were entitled to judgment as a matter of law. The correctness of this conclusion overwhelmingly appears when the record is examined.

(a) The affidavits filed by petitioners in opposition to the motion for summary judgment are totally insufficient to raise genuine issues of fact.

The moving papers of these respondents, on their motion for summary judgment, included affidavits which

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* *Cf.* Rule 113, New York Rules of Civil Practice, adopted in 1921. See Judge Charles E. Clark (who sat below and acted as Reporter for the Revisers of the Federal Rules), *Summary Judgments*, Jud. Admin. Monographs, Series A, No. 5 (American Bar Association, 1941).

conformed to the explicit requirements of Rule 56(e) (Appendix B, p. 53); they were made on personal knowledge, by persons competent to testify as to the matters stated therein and set forth facts which would be admissible in evidence.

Mr. Eisenhart, President and General Manager of Bausch & Lomb Optical Company, in an affidavit (R. 17-31), which was adopted by Mr. Carl Bausch, its Vice-President in Charge of Engineering and Research (R. 32), and Mr. Drescher, its Vice-President in Charge of Manufacture (R. 33), in effect testified to the following:

That the 1925 amendments to the 1921 agreement were in terms revoked by the 1926 agreement (R. 27). That Bausch & Lomb had not agreed to inflate its bids on military optical instruments supplied to the United States Government by any amount and had not in fact done so (R. 27); that the price to be charged the United States Government by Bausch & Lomb on military optical instruments manufactured by it for the Government was decided upon by Bausch & Lomb alone, without the participation or consent of any other organization (R. 27-28); that bids made by Bausch & Lomb to the United States Government for such military optical instruments did not include 20% or any other artificial sum to be paid by Bausch & Lomb (R. 28); that the only payments made by Bausch & Lomb were the royalty payments, which did not exceed 7% and were paid to Carl Zeiss of Jena, as provided in the agreements (R. 28); that sample instruments of foreign manufacture have occasionally been imported for examination and testing (R. 28); that since Bausch & Lomb had manufacturing rights under designs and patents of Carl Zeiss of Jena for such equipment, the

Army and Navy generally contracted with Bausch & Lomb for sample Zeiss military optical instruments (R. 28); that in such cases the prices quoted to Bausch & Lomb were determined independently by Carl Zeiss of Jena, and the contract prices between the Army and Navy and Bausch & Lomb were determined independently by the latter, Bausch & Lomb assuming responsibility for the satisfactory character and performance of the instruments (R. 28); that Bausch & Lomb paid Carl Zeiss of Jena nothing beyond the net amount of its quotations for these instruments (R. 28); that on one occasion in 1927 a contract was made between the United States Government and N. V. Nederlandsche Instrumenten Compagnie of Venlo, Holland, a subsidiary of Carl Zeiss of Jena, for the importation of a sample military optical instrument; that the contract price for such instrument included 5%, which was paid to Bausch & Lomb as exclusive American licensee under the patents of Carl Zeiss of Jena, covering this instrument; that it was understood that Bausch & Lomb would assist the United States authorities in straightening out whatever questions might arise regarding the design and performance of the instrument and would undertake the manufacture of such further instruments of similar character as might be desired by the United States Government (R. 28-29); that "at no time was there any occasion when the 20% bid provision of the 1925 agreement—which, by its terms, was inapplicable to bids by Bausch & Lomb to the United States—was invoked in any transaction with the Government of the United States, to which Bausch & Lomb was in any way a party" (R. 29); that the allegations in paragraph "Eleventh" of

the complaint are utterly false and untrue* (R. 29); moreover, the affidavit flatly denied that at various undisclosed times the defendants presented to various officers of the United States bids, claims, invoices, bills, vouchers, etc., against the United States, knowing that such documents were excessive, false, fictitious and fraudulent, and stated that neither Bausch & Lomb nor anyone on its behalf had submitted any claim upon or against the Government of the United States, or any department or officer thereof, which was false, fictitious or fraudulent in any respect (R. 29), and that "the sweeping character of this denial does not depend on the form of the words of the charge or of this answer"** (R. 29-30).

In his affidavit, Mr. Eisenhart thus, in effect, testified, on personal knowledge, precisely as he could and would have testified, if on the stand,*** as to what Bausch & Lomb had done and had not done. Thus, he effectively demonstrated that the charges had no foundation in fact and placed upon the petitioners the onus of producing some admissible evidence tending to support any of the material charges which had been made if they chose to controvert the facts so established.

Petitioners found themselves in a difficult position of

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*The substance of the allegations of paragraph "Eleventh" of the complaint are carried over into paragraph "Fourteenth" of the so-called amended complaint (R. 82); they contain the essence of petitioners' charges as to misrepresentations in connection with bids.

** This denial is equally applicable to the allegations of paragraph "Fifteenth" of the amended complaint, which contains the charge of submission of fraudulent claims. Petitioners say that the statements in the affidavits were not broad enough, but, if broad enough, that they were not in accord with some of the allegations in the anti-trust proceedings (Pet. Br., pp. 18-21). On the contrary, they were as broad as the charges in the complaint and in the so-called amended complaint; as we shall see, they could not be disregarded on the strength of the inadmissible proceedings on which petitioners rely.

*** "Let the affidavit follow substantially the same form as though the affiant were testifying in court." Hon. Bernard L. Shientag, *Summary Judgment* (The Viking Press, 1941), page 49.

their own making. To have filed no counter-affidavit might have been fatal as the court would have been justified in considering this failure as an admission that no issues of fact remained. *Allen* v. *Radio Corporation of America*, 47 F. Supp. 244 (D. Del. 1942). On the other hand, the requirements of Rule 56(e) presented an insurmountable obstacle, since they had no personal knowledge either of facts or of specific admissible evidence which would support their charges.

They made a colorable but vain attempt to extricate themselves from the dilemma which the salutary provisions of Rule 56 presented to them, in common with all litigants in the Federal Courts, by responding with an affidavit of petitioner Thebner, one of the two lawyer plaintiffs who brought this action (R. 64-76), which was adopted by petitioner Brensilber, his co-plaintiff (R. 77). The affidavit in substance merely incorporated the following papers from the court files in the anti-trust proceedings: the indictment (R. 86-111); the Government's bills of particulars (R. 112-193, 194-211); the equity complaint (R. 212-242), and the consent decree (R. 243-248). The petitioners consigned these papers to the District Court's attention with the conclusory statement that the complaint and proposed amended complaint were not sham and false as the incorporated papers supported the ultimate facts and conclusions therein set forth (R. 64-65). Significantly, the affidavit failed to point out any specific admissible evidence in support of that conclusion.

A consideration of each of the anti-trust proceeding papers incorporated by reference into the affidavit discloses that petitioners failed to comply with the plain mandate of Rule 56(e) of the Federal Rules of Civil Pro-

cedure, that a party must utilize admissible evidence if he would raise genuine issues of fact by affidavit.*

The indictment would not be admissible in evidence as proof of the truth of the facts therein alleged and the fact that the defendants pleaded *nolo contendere* thereto did not make it so (*Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366 (D. Minn., 1939), aff'd 119 F. (2d) 747, cert. den. 314 U. S. 644; *Barnsdall Refining Corporation* v. *Birnamwood Oil Co.*, 32 F. Supp. 308 (E. D. Wis., 1940)). In the *Twin Ports Oil Co.* case, *supra*, the plaintiff, in a civil anti-trust action had incorporated into the complaint an indictment and judgment entered on a plea of *nolo contendere*. The defendants moved to strike such matter from the complaint. The Court ordered all references to the proceedings which the Government had brought stricken as immaterial, irrelevant and prejudicial. In so holding, the Court indicated that:

> "• • • A judgment entered on a plea of nolo contendere does not constitute a finding on any fact question. *It does not establish the truth of the facts set forth in the indictment.* • • •" (p. 378; emphasis supplied)

The Government's bills of particulars, being merely amplifications of the criminal pleading and self-serving,

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* Since its adoption the courts have repeatedly applied the plain requirements of Rule 56(e) and have consistently held that only admissible evidence in affidavits may be considered. So it has been held that evidence should be disregarded when subject to the following objections: incompetency (*Banco de Espana* v. *Federal Reserve Bank*, 114 F. (2d) 438 (C.C.A. 2, 1940)); parol (see *Fox* v. *Johnson & Wimsatt Inc.*, 31 F. Supp. 64, aff'd 127 F. (2d) 729 (App. D.C. 1942)); hearsay (*Seward* v. *Nissen*, 2 F.R.D. 545 (D. Del. 1942), *supra*; *Boerner* v. *United States*, 26 F. Supp. 769 (E.D.N.Y. 1939); see *Edward B. Marks Music Corp.* v. *Stasny Music Corp.*, 4 Fed. Rules Serv. 773, (S.D.N.Y. 1941), *supra*); failure to comply with the best evidence rule (see *Town of River Junction, et al.* v. *Maryland Casualty Company*, 110 F. (2d) 278 (C.C.A. 5, 1940)). Affidavits not based upon personal knowledge are likewise to be disregarded (*Hummel* v. *Wells Petroleum Company*, 111 F. (2d) 883 (C.C.A. 7, 1940); *Person* v. *United States*, 112 F. (2d) 1 (C.C.A. 8, 1940), cert. den. 311 U. S. 672).

are equally inadmissible as such. The function of such particulars is to specify details of general allegations and to limit proof at the trial (*United States* v. *Adams Exp. Co.*, 119 Fed. 240 (S. D. Iowa, E. D. 1902); *Kettenbach* v. *United States*, 202 Fed. 377, 383 (C.C.A. 9, 1913); *United States* v. *McKay*, 45 F. Supp. 1001, 1002 (E. D. Mich. S. D. 1942); *United States* v. *Kessler*, 43 F. Supp. 408, 412 (E. D. N. Y. 1942)). They could not be used on petitioners' behalf as evidence of the truth of the matters therein set forth. *Cf. Roscoe Lumber Co.* v. *Standard Silica Cement Co.*, 62 App. Div. 421, 70 N. Y. Supp. 1130 (1901); *Seim* v. *Krause*, 13 S. D. 530, 83 N. W. 583 (1900); *Hesser-Milton-Renahan Coal Co.* v. *La Crosse Fuel Co.*, 114 Wis. 654, 660, 90 N. W. 1094, 1096 (1902); *Belote* v. *O'Brian's Adm'r.*, 20 Fla. 126, 138 (1883); *Abbey Sales Company, Inc.* v. *Johnson*, 262 App. Div. 1021, 30 N. Y. Supp. (2d) 295 (1941).

Moreover, the equity complaint and consent decree, entered into before any testimony had been taken, would be equally inadmissible for such purposes. Section 5 of the Clayton Act* provides that final judgments in Government criminal or equity proceedings under the anti-trust laws shall for certain purposes make out a *prima facie* case in treble damage suits under such laws, but expressly excepts "consent judgments or decrees entered before any testimony has been taken." This statutory exception is simply a reiteration of the law which had theretofore prevailed. As was said by Mr. Justice Holmes in *Buckeye Powder Company* v. *E. I. DuPont de Nemours Powder Company*, 248 U. S. 55, 63 (1918), an action instituted before the Clayton Act was passed:

> "The next matter requires but a few words. The plaintiff offered in evidence decrees in a pro-

* Act of October 15, 1914, c. 323, §5, 38 Stat. 731, 15 U.S.C. §16.

> ceeding by the Government finding the DuPont Company guilty under the Sherman Act of an attempt to monopolize. 188 Fed. Rep. 127. These, of course, were held inadmissible. * * *"

Consequently, the stipulation in the consent decree which these respondents entered into "that neither such consent nor this decree shall be evidence, admission or adjudication that they have violated any statute of the United States" (R. 243), was effective and neither the pleading nor the decree constituted admissible evidence.

These objections to an attempt to use the anti-trust pleadings and proceedings as a substitute for the admissible evidence which Rule 56(e) required petitioners to adduce are not technical but fundamental. Petitioners have simply attempted to lift their own allegations, of whose truth they had no personal knowledge, by the bootstraps of other allegations of which they likewise had no knowledge and which they could not have used upon a trial. Repetition of allegations cannot give them probative value.

Out of the mass of documents which petitioners have brought into the record, all of which, as we have so far discussed them, were plainly inadmissible as evidence, the only remaining material to be examined are the exhibits annexed to the Government's bill of particulars. Only those exhibits have any resemblance to evidence. Leaving aside for the moment any question of materiality or relevancy, they are the only documents which could possibly be thought to bind these respondents.

(b) The record shows no competitive bidding requirement and no thwarting thereof; the exhibits raise no genuine issue of fact.

Since the decision of this Court in *Marcus* v. *Hess* was handed down, the petitioners have, for the first time,

taken the position that the heart of their case is that these respondents were engaged in a conspiracy with Zeiss of Jena to thwart the competitive bidding process.

It appears to be their claim that Carl Zeiss of Jena and Bausch & Lomb were competitive bidders, that Zeiss, pursuant to an agreement with Bausch & Lomb, systematically abstained from competitive bidding and when it did not abstain from such bidding made colorable protective bids at increased prices fixed by Bausch & Lomb, all of which resulted in Bausch & Lomb procuring Government contracts at excessive prices. The evidence in this record does not support any such contention.

Despite the fact that petitioners alleged that respondent Bausch & Lomb made fraudulent sales to the United States Government totaling many millions of dollars over a period of twenty years, the Government's bills of particulars, the result of an exhaustive investigation, and apparently petitioners' sole source for any detail of their general charges, allege only one sale by Bausch & Lomb to the United States Government and only four other instances of any dealings or communications involving the Government in connection with Zeiss instruments. Of these, only one is supported by an exhibit, Exhibit U. With the possible exception of the proposed transaction mentioned in that exhibit, the other references are mere allegations in the Government's bills of particulars, inadmissible as evidence for the reasons stated above*. However, we examine those allegations in a footnote to show that they do not support petitioners' claims.**

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* The agreements of 1921, 1925 and 1926 are annexed to the Government's bills of particulars as Exhibits A-F (R. 145-161), and to the Government's equity complaint as Exhibits A-D (R. 228-242). They will be considered in the last section of this Point (*infra*, p. 29); as we shall show, they do not aid petitioners.

** The first instance concerns the importation, on or about September 15, 1928 or 1938, of a stereo-telemeter (range finder) by Bausch & Lomb from Carl Zeiss of Jena, which was sold by Bausch & Lomb to the United States Government for approximately $24,460 (R. 118-119, 142-143). It is included

Thus, the only possibly admissible evidence in this record giving any detail of a potential transaction with the United States is Exhibit U (R. 188-192). Unless that provides the foundation for petitioners' present theory, their argument finds no support in this record. The actual agreements between Zeiss and Bausch & Lomb, examined *infra*, do not support their theory.

Exhibit U (R. 188-192) was cited by the Government in its bills of particulars as an instance wherein "Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb • • •" (R. 138). It is a copy of a letter, dated March 7, 1928, from Bausch & Lomb to Carl Zeiss of Jena. It appears therefrom that the American Embassy in Berlin, presumably on behalf of the Navy Department, had inquired at Nedinsco (an affiliate of Zeiss) with regard to the supply of three Zeiss periscopes with accessories of a new type, in which it appears that the Navy Department had not been previously interested. Zeiss was apparently of the opinion that if the Embassy could be interested in the instruments it might mean some business for Bausch & Lomb in the future, and cabled the terms of sale:

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in the bills of particulars for the sole purpose of supporting the jurisdiction of the District Court for the Southern District of New York in the anti-trust proceedings (*Cf.* R. 118-119, 142-143). There is no indication whatever that this transaction was improper. The Government did not claim it to be and the respondents' affidavits establish its propriety (R. 28).

The second, in 1929 (R. 138), was alleged by the Government to be one of three instances of Zeiss' refusal to sell military optical instruments in the United States unless Bausch & Lomb consented. Only this one involved the Government. There is no evidence whatever that a "protective offer" was involved or that the refusal involved fraud. We point out, *infra*, that consent of an exclusive licensee was appropriate.

The third, fourth and fifth (R. 138-139) are alleged to be instances in which Zeiss offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb. Of the total of four such cases given, one does not concern the Government. Item "(i)" refers to Exhibit U (R. 188-192) in support thereof and will be considered in the text. There is no indication in items "(ii)" and "(iii)" that "protective offers" by Carl Zeiss of Jena were involved, and the Government, in the anti-trust proceedings, made no claim that they did. Again, consent of the exclusive licensee was a normal precaution.

"• • • Nedinsco will quote with date of delivery usual foreign countries dollars price delivered f.o.b. Rotterdam 10% for you • • •."

As appears from the copy of the cablegram of March 7, 1928 (R. 191), the commission was included within the usual foreign countries price.

This exhibit lends no support to petitioners' present theory of their case. Far from showing that the inquiry bore relationship to a quest for competitive bids, it appears to have been an inquiry for a quotation on an instrument for which no similar inquiry had been made of Bausch & Lomb. Since the price to be quoted was the "usual" price which Nedinsco quoted foreign countries and included a commission of 10% for Bausch & Lomb (R. 188), the exhibit directly negatives the petitioners' contention upon which their theory of the case depends, that such a quotation, if made, involved a "protective bid" or any excessive price. Finally no consummation of even this transaction is reflected in the bill of particulars (*Cf.* R. 142-143), and the respondents' affidavits indicate that it did not in fact materialize (R. 28-29).

Even if the transaction had been consummated, the payment of the proposed commission to Bausch & Lomb would appear to have been entirely consistent with the rights which Bausch & Lomb had as exclusive licensee. Fraud could not possibly be inferred.

Petitioners' attempt to invoke the *Marcus* case and the other authorities dealing with competitive bidding upon which their argument is predicated must fail. There is no evidence in this record to show that military optical instruments were subject to competitive bidding requirements, that Bausch & Lomb and Zeiss were asked to submit competitive bids, or that the Government considered

Zeiss a potential competitive bidder. There is nothing to show that Bausch & Lomb had a monopoly in this field. These omissions do not appear to be inadvertent; many factors which may be noticed point to the conclusion that military optical instruments were not subject to competitive bidding requirements and that Zeiss was not a potential competitive bidder. It would seem that as "ordnance," military optical instruments were not within the requirements of competitive bidding.* Furthermore, a long-standing legislative policy emphasized the desirability of purchasing such equipment from American

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* Military optical instruments, being of a highly technical and specialized nature, are in a different category from much of the material which the Government purchases. Neither the Army nor the Navy is required to seek competitive bids on "ordnance." Webster's New International Dictionary, 2d Ed., defines "ordnance" as including range finders, etc., and the definition obviously is broad enough to cover all military optical instruments as defined in the complaints (R. 4, 80).

The United States Government Manual, Fall 1942, page 248 in describing the function of the Navy Bureau of Ordnance states:

> "The Bureau of Ordnance, under the direction of the Secretary of the Navy, is charged with and responsible for the design, manufacture, procurement, maintenance, issue, and efficiency of all offensive and defensive arms and armament * * * and, except as specifically assigned to other cognizance, optical and other devices and material for the control of guns, torpedoes, and bombs."

Among the statutes exempting ordnance from requirements of competitive bidding are:

As to the Navy, Rev. Stat. §3721, 34 U.S.C., §569, provides in part:

> "The provisions which require that supplies shall be purchased by the Secretary of the Navy from the lowest bidder, after advertisement, shall not apply to ordnance, gunpowder, * * *."

In 1897 the Attorney General rendered the opinion that under R.S. §3721, the Navy Department could contract with an American concern for the manufacture of rifles without competitive bidding. 21 Ops. Att'y. Gen. 577.

As to the Army, the Act of May 11, 1908, c. 163, 35 Stat. 106, 125, 10 U.S.C. §1199, provides:

> "Whenever proposals are invited for the furnishing of articles of ordnance property, the character of which or the ingredients thereof are of such a nature that the interests of the public service would be injured by publicly divulging them, the Chief of Ordnance is authorized to purchase such articles in such manner as he may deem most economical and efficient."

See also Act of March 2, 1901, c. 803, 31 Stat. 895, 905, Act of June 30, 1902, c. 1328, 32 Stat. 507, 514, 10 U.S.C. §1201.

sources.* Finally, it is hardly conceivable that the United States military authorities would have looked to Carl Zeiss of Jena, or any other foreign concern, as its source of supply for such vitally important equipment as the range finders which control gunfire on our ships any more than they would have had our battleships constructed on foreign ways. The particulars furnished by the Government, with complete facilities for investigation, reflect, at

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* Aside from the public policy affecting military optical instruments, during the past twenty years, at least, various Army and Navy appropriation acts have contained provisions manifesting the existence of a "Buy American" policy. The Act of February 28, 1931, c. 326, 46 Stat. 1431, 1450, provided in part:

> "That in the expenditure of appropriations in this Act the Secretary of the Navy shall, unless in his discretion the interest of the Government will not permit, purchase or contract for, within the limits of the United States, only articles of the growth, production, or manufacture of the United States, notwithstanding that such articles of the growth, production, or manufacture of the United States may cost more, if such excess of cost be not unreasonable."

Identical language is to be found in the following Navy Department appropriation acts: Act of June 30, 1932, c. 318, 47 Stat. 421, 441-2; Act of March 3, 1933, c. 213, 47 Stat. 1521, 1540; Act of March 15, 1934, c. 69, 48 Stat. 403, 421; Act of June 24, 1935, c. 291, 49 Stat. 398, 418.

In his Annual Report for 1924, contained in the Annual Reports of the Navy Department, at page 272, the then Chief of the Bureau of Ordnance, Rear Admiral C. C. Bloch, stated that the Bureau advocated the policy of purchasing all high grade optical instruments in this country.

Army appropriation acts containing provisions of similar import are: Act of June 30, 1921, c. 33, 42 Stat. 68, 90; Act of June 30, 1922, c. 253, 42 Stat. 716, 742-3, 754.

Furthermore, this "Buy American" policy is given general application by the Act of March 3, 1933, c. 212, 47 Stat. 1489, 1520, 41 U.S.C., §10a. (See also Act of June 30, 1914, c. 130, 38 Stat. 392, 399, 34 U.S.C., §568.)

The policy of encouraging the development of domestic sources for military optical instruments was long ago also advocated in Great Britain. See Instructor-Commander Baker, *Optical Instruments in the Fighting Services*, Journal of Scientific Instruments, Vol. II, page 380 (Cambridge (Eng.) University Press, 1925):

> "The modern utilization of optical apparatus for fighting purposes had its beginning about thirty years ago and is consequent upon improvements in guns and the increased ranges at which actions could be fought. Optical instruments as aids to vision became necessary since the precision of laying the guns becomes more important at the greater ranges. In consequence, the whole series of optical instruments now used, gun-sights, rangefinders, spotting binoculars, etc. has had to be evolved slowly and adopted after service trials, and they have had by this time a profound effect upon the tactics of war. To such an extent are the ships of the Fleet now dependent upon optical instruments that it is no exaggeration to say that without them, and without an efficient industry for their pro-

most, only infrequent inquiries for Zeiss sample instruments and they negative competitive bidding. It may be assumed that any regular course of dealings would be reflected therein. This absence of proof confirms the natural conclusion which military realities would seem to compel. The defects in this record, which make petitioners' present contentions academic, in the very nature of the subject matter, appear to be irreparable.

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duction, our Navy would be at the mercy of an enemy inferior in guns and ammunition.

The equipment of the Services with 'Optical Munitions' is at the present time very good. It is without the slightest question better than any other country gets from its native optical industry. We are better provided with optical glass, we have better optical designs, we have better instrument manufacture. Improvements still go on; new instruments to cope with new conditions of warfare are constantly needed, and it is of vital importance for national safety that this country should not lag behind in the maintenance of the efficient optical industry that we now possess.

Not only are service instruments very good of their class, but, what is frequently not realized, they rank among the finest examples of scientific instruments of precision. Obviously in a public journal, detailed descriptions of service instruments cannot be given but anyone who has any doubt regarding their high scientific character has only to think of the rangefinder, an instrument which determines ranges by measurement of an angle to fractions of a second of arc and has to function satisfactorily, not in the constant temperature room of a laboratory, with infinite precautions to avoid vibration, but in the control tower of a ship at sea subject every minute to violent concussion from salvos of big guns.

In order that the optical instrument industry may remain in a satisfactory condition to serve the Navy, Army and Air Force, it is imperative that it should possess a flourishing civilian trade so as to keep a sufficient number of skilled workmen constantly employed. In service instruments above all others the high quality of the precision demanded necessitates skilled hand labour, particularly for optical grinding and polishing. Such labour cannot be improvised on the outbreak of war. In a few cases men require two or three years' training and must be kept constantly at work or they lose their touch. The requirements of the Services in peace time are quite insufficient to keep an adequate number of men engaged and unless the instrument-making firms in the country can keep such men employed on similar work, such as photographic lenses, binoculars, microscopes, etc., national safety will be very seriously menaced. There is, unfortunately, still a persistent but erroneous impression, particularly in scientific circles, that to obtain the best optical apparatus it must be bought abroad. This belief, when probed to the bottom, is usually found to rest on the fact that Abbe's researches into optical glass made the design of the apochromat microscope objective possible. Much has taken place since those days and the purchase of foreign optical goods at the present time is doubly foolish: our vitally necessary industry is starved and the purchaser gets an inferior article."

It is therefore unnecessary to consider cases such as *McMullen* v. *Hoffman*, 174 U. S. 639 (1899) and *City of Oakland* v. *California Construction Co.*, 15 Cal. (2d) 573 (1940), among others cited in petitioner's brief, which involve agreements affecting competitive bidding. Furthermore, none of these decisions involved the special requirements of the provisions of the Informer's Act.

(c) On the facts of record respondents were entitled to judgment as a matter of law.

As it appears from the foregoing discussion that the admissible evidence in this record, so far, entirely fails to support a claim under the Informer's Act, there remains for consideration only the agreements between Zeiss and Bausch & Lomb.* Some reference to the terms of the statute is necessary in that connection.

Revised Statutes, §5438, limits the right to bring an informer's action to three states of fact. It must appear that the defendant is one:

> "(1) who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or
>
> (2) who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim,

* While the court below did not find it necessary to refer, in its brief *Per Curiam* opinion, to the details of the record which we have thus far analyzed, it is fair to assume that the inarticulate premise of its discussion of the agreements was that there was nothing else in the record which could block summary judgment for respondents. As we shall see, the court below found nothing in the agreements to raise an issue of fact under Rule 56 which would justify denial of the motion for summary judgment. On the contrary, the court properly recognized that "The action is of precisely the sort which a motion for summary judgment was intended to nip in the bud" (R. 269).

> makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or
>
> (3) who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * *."

Petitioners appear to rely on the first and third clauses. The record, on motion for summary judgment, will not support a claim under any.

Bausch & Lomb entered into an agreement with Carl Zeiss of Jena in 1921 (R. 145-150); this agreement was modified twice in 1925 (R. 151-2, 153-156). The 1921 agreement, together with the 1925 amendments, were revoked by the provisions of the agreement entered into in 1926 (R. 157-161). The "protective offer" provision, to which petitioners attach much weight, was included only in the 1925 amendments, and this, like all other terms of the 1921 and 1925 agreements, effectively ended in 1926. In the teeth of the agreements, and the statements in the affidavits that the 1926 agreement in terms revoked the earlier agreements, petitioners argue that the parties did not mean what the agreements say and that, in fact, the protective offer provision continued after 1926. In support of these allegations, they point to no exhibits which refer to protective offers after 1926 (see footnote Pet. Br. p. 33) and to none which is not consistent with the performance of the 1926 agreement. It appears from respondents' affidavits (R. 17-33) that at no time, even when the 1925 agreements were in effect, was the pro-

tective offer provision ever invoked in any transaction involving the Government. No exhibit even suggests that it was.

It is established by the respondents' affidavits that, when Bausch & Lomb sold military optical instruments to the United States Government which it had manufactured under the rights granted to it by Carl Zeiss of Jena, it alone determined the price to be charged the Government; that, when Bausch & Lomb imported Zeiss military optical instruments for resale to the United States Government, Zeiss alone determined the price which it would charge Bausch & Lomb, and Bausch & Lomb independently determined the price which it would charge the Government (R. 28). There is no dispute that the 1926 agreement required payment to Zeiss of certain royalties for the patent and other rights granted to Bausch & Lomb by the 1926 agreement. These were the only payments ever made to Zeiss by Bausch & Lomb in connection with any transaction with the United States (R. 28). Petitioners do not appear to challenge these royalty payments, nor could they.

On the basis of the facts constituting admissible evidence, respondents were clearly entitled to judgment as a matter of law, since there is no basis for a conclusion that the 1926 agreement was a violation of the Informer's Act and none that any claim based on a sale to the United States Government of military optical instruments was false or fraudulent.

Since the 1921 and 1925 agreements were effectively terminated by the 1926 agreement and there is no evidence of the use of the "protective offer" provision of the 1925 agreement in any transaction with the United States, and the dates of those agreements are, furthermore, long before the bar of the six-year statute of lim-

itations (R. S. §3494, 31 U.S.C. §235), it seems unnecessary to consider those agreements in detail. By this omission we do not concede that those agreements were within the statute.*

On this record, petitioners' rights must depend on the 1926 agreement, and it is entirely clear that this agreement does not resemble the kind of agreement at which the statute is aimed. The effect of the agreement was improvement of military optical instruments for the benefit of our armed services (R. 30)—not fraud upon this Government. Bausch & Lomb had early been encouraged to develop its military optical manufacture by the United States Navy so that our Government would have the advantage of a domestic source of high quality with the benefit of Zeiss' advances.** And the United States re-

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* A few comments on the 1921 and 1925 agreements may, however, be made. Petitioners treat the 1921 agreement as if it had no basis other than some improper restrictions on sales to the United States Government. When Section 3 thereof (R. 147) is examined, it is evident that the reference "to the United States" is a geographical reference, complementary to the reference to sales "to countries outside of the United States of America." The parties obviously contemplated that the market for such instruments would include purchasers other than the Government (see paragraph 2, R. 146). An examination of the entire agreement indicates that it was, in essence, a layman's version of an exclusive license to Bausch & Lomb under Zeiss' American patents and processes. Aside, perhaps, from the restriction on Bausch & Lomb's sales abroad, its legal consequences would appear to be the same as those of any other exclusive license. The "protective offer" provisions of the 1925 amendments appear to have been mere implementations of the provisions of the 1921 agreement. The 1925 agreements did not require that either party should make protective offers whenever an inquiry was received from a purchaser in the territory reserved to the other. The party whose exclusive territory was involved had the option of requiring the making of a protective offer. There is no evidence whatever that Bausch & Lomb ever required Zeiss to make a protective offer on any transaction with the United States Government, and, thus, that the protective offer provision ever could have affected the transactions between Bausch & Lomb and the United States Government. The admissible evidence in this record is squarely to the contrary (R. 29).

** See Commander Cleary, U. S. Navy Member, *Range Finders and Range Finding*, Journal of American Society of Naval Engineers, Volume 32, p. No. 1, pp. 1-37 at pages 3-4 (Feb. 1920):

> "Some years ago, as a result of the wise policy of the fire control officer in the Bureau of Ordnance, Lieutenant Commander H. B. Price and the Chief of the Bureau, Rear Admiral N. E. Mason, the Bureau gave every aid and encouragement to the Bausch & Lomb Optical Company of Rochester, N. Y., to establish a range finder department.
>
> The Bausch & Lomb Optical Company was especially well fitted for this development work, being, at that time, the only manufacturer in

ceived these benefits. Fundamentally, the 1926 agreement gave Bausch & Lomb the exclusive right to manufacture and sell in the United States under the inventions and American patents of Carl Zeiss of Jena in the military optical instruments field and, in addition, the advantage of its research in that field. In effect, Bausch & Lomb became the exclusive distributor in this country of Zeiss military optical instruments and instruments manufactured by Bausch & Lomb pursuant to the inventions, American patents, and technique of Zeiss.

In so far as any exhibit attached to the bills of particulars (see Pet. Br., footnote, p. 33) indicates that Zeiss sought the consent of Bausch & Lomb in the territory where the latter was exclusive licensee or that Bausch & Lomb sought consent of Zeiss in territory where it had no license, this procedure seems consistent with the legal position of the parties under the 1926 agreement. No secret or mysterious understanding for continuance of

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the United States with any extended experience in supplying optical instruments for the Bureau of Ordnance; in addition, the Bausch & Lomb Company was closely connected with the famous optical firm of Carl Zeiss of Jena, Germany, the foremost scientists in the optical world. A great part of the researches and developments of the Zeiss works thus became available for the use of the Bureau of Ordnance. The good faith and confidence of the Bausch & Lomb Company were shown in their first contract with the Bureau of Ordnance, in which the Bureau's acceptance of the range finder was conditioned on their being at least as accurate as any known instrument of equal base length.

The Bureau's encouragement of the Bausch & Lomb Company resulted in the establishment in the United States of a thoroughly equipped range finder factory as a source of supply in time of hostilities.

The value of a range finder establishment located in the United States has been shown by the present war which has prevented our purchasing any range finders abroad.

In time of peace, there are the advantages of efficient inspection during manufacture, of quick repair to damaged instruments and of experience and training for many officers and men who have had instruction in the Bausch & Lomb factory.

Our present range finders embody several new and valuable features, some of these due to The Carl Zeiss Company, others to the Bausch & Lomb Company."

See also: *The Manufacture of Optical Glass and of Optical Systems*, Ordnance Dept. Doc. No. 2037, pp. 5-15, 287-298 (Government Printing Office 1921).

the revoked agreements can be read into such communications.

In *Littlefield* v. *Perry*, 21 Wall. 205 (1874), and *Excelsior Wooden Pipe Company* v. *Pacific Bridge Company*, 185 U. S. 282 (1902), this Court indicated that an exclusive patent licensee may sue the owner of the patent who has infringed. Moreover, it has been held that the holder of an exclusive patent license to make and vend a patented article in the United States may obtain an injunction to prevent sales in that territory by the owner of the patent. *Benson* v. *Crane*, 257 Ill. App. 71, 91 (1930); *Sherrill* v. *Alabama Appliance Co., Inc.*, 240 Ala. 46, 197 So. 1 (1940), and that the holder of certain exclusive patent rights covering certain states may sue for breach of contract the owner of the patent who has invaded his territory and his exclusive right to sell in the same. *Manning* v. *Galland-Henning Pneumatic Malting Drum Mfg. Co.*, 141 Wis. 199, 203, 204; 124 N. W. 291, 292, 293 (1910).

In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 402 (1911), this Court stated:

> "• • • The secret process may be the subject of confidential communication and of sale or license to use with restrictions as to territory and prices. *Fowle* v. *Park*, 131 U. S. 88. A similar principle obtains with respect to the confidential communication of quotations collected by a board of trade. *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236."

See also *John D. Park & Sons* v. *Hartman*, 153 Fed. 24, 30 (C.C.A. 6, 1907).

Under these authorities it is clear that for Zeiss to have made a sale in the United States of articles covered by the 1926 agreement without the consent of Bausch &

Lomb might have exposed it to suit for infringement or injunction. It is impossible to conceive how such an arrangement could constitute a fraud on any purchaser. It would be subversive of daily commercial practice and a threat to all patents and patent licenses to say that a fraud has been perpetrated on the purchaser from a licensee because the patentee, *ipso facto*, cannot compete in that particular territory.

The natural inference is that the reason for the consents sought by Bausch & Lomb when it considered sales to purchasers who might use patented products outside the United States was that only by such consents could Bausch & Lomb make sure that its prospective customers would be protected against claims of infringement by Zeiss under foreign patents.

But whether the inferences suggested are correct or not, it is apparent that the few documents which contain evidence of consents sought by one party or the other were not of a character which a court could accept as evidence of a violation of the Informer's Act by Bausch & Lomb. In the face of the positive statements in respondents' affidavits, which explicitly refuted any claim of false bids or fraudulent claims, no genuine issue of fact could be created by occasional communications, not involving the United States at all. The difficulty in drawing the strained and unlikely inference which petitioners seek to draw from such communications is emphasized by the elaborate hypotheses and confusing suppositions to which petitioners are driven. (See Pet. Br. p. 33, final paragraph of footnote.)

It is, of course, irrelevant to the question here whether any of the agreements were open to attack under the anti-trust laws which is what the court below meant by its reference to a "wrong". This is made perfectly obvious by the Court's statement "* * * it appears beyond

question that the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded *nolo contendere,* and that this in turn rested upon the contracts" (R. 269). Its opinion plainly means that, even taking the best case from petitioners' point of view and assuming that the agreements, or one of them, gave Bausch & Lomb an advantage in the form of a monopoly, which was unlawful under the anti-trust laws, it did not at all follow therefrom that each and every sale made thereafter was *ipso facto* a fraud on a purchaser, including the United States, in short, that every sale by a monopolist is not, *per se,* fraudulent. It then held that in such a case some additional factor such as a misrepresentation would be required in order to found liability under the Informer's Act and concluded that no such factor existed here.

Although it was not necessary for the Court to go that far in its assumption, since there was neither evidence nor claim that Bausch & Lomb had a monopoly, still the conclusion reached by the Court as to the consequences, if there had been a monopoly, was undoubtedly correct. Cf. *A. B. Small Co.* v. *Lamborn & Co.,* 267 U. S. 248, 252 (1925); *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.,* 236 U. S. 165 (1915); *Barnsdall Refining Corp.* v. *Birnamwood Oil Co.,* 32 F. Supp. 314, 315, 316 (E. D. Wis., 1940).

POINT III

The Government's Brief as *amicus curiae* in support of the petition poses a question which on this record is hypothetical and the criticism of the construction by the court below of R. S. §5438 as requiring deceit appears to be unfounded.

After our Brief in Opposition was filed, the Solicitor General filed a brief *amicus* in support of the petition, upon which we have previously had no opportunity to comment. In that brief, the Solicitor General contended that when the court below held that the fraud contemplated by R. S. §5438 was fraud in the accepted sense of deceit, it had taken too narrow a view of the scope of the statute. He apparently argued for a construction which would not require any misrepresentation of fact. The limits of the broad construction sought were not delineated. He contended that the statute should be construed so that, "a claim based on a contract secured as a result of any conspiracy to eliminate competitive bidding, no matter by what means it is carried out, is fraudulent within the meaning of R. S. §5438."

From our earlier analysis of the record, it appears that the question thus posed by the *amicus curiae* brief is hypothetical. No genuine issue has been raised as to the existence of the requirement of competitive bidding (much less that there was a conspiracy between all or any potential competitive bidders on military optical instruments) in any transaction in which Bausch & Lomb or Carl Zeiss of Jena may or could have been involved with the United States Government. Considerations which may be noticed (*supra*, p. 26) point to the conclusion that they were not actual or potential competitive bidders in dealing with

ordnance procurement officers and technicians of the War and Navy Departments, and that, accordingly, their agreements could not be or be construed as conspiracies to eliminate or to thwart competitive bidding. Furthermore, the opinion of the court below did not so construe them. So whatever the merit of the Solicitor General's contention might be in a proper case, it is not one which this Court should or need consider in this case. Since, however, the Court may wish to consider the question of construction of the Informer's Act adverted to by petitioners and the Solicitor General, we submit certain considerations indicating that the construction of the statute below was correct.

(a) The statute was designed and passed to prevent deceitful practices, to prevent "cheating" the Government; deceit is the essence of the offense.

The general fraud legislation of 1863, of which the Informer's Act is a part, was enacted for the purpose of coping with a definite class of frauds which had been perpetrated upon the Government during the Civil War and for which there existed no adequate legal remedy. The legislative history reflects the types of wrong with which Congress was concerned.* The Senate sponsor summarized the purpose of the bill as one to protect against those who would "cheat the United States" (*Marcus* v. *Hess, supra,* p. 544). The element of deceit appears to have been present in the transactions with which Congress was concerned; it would seem to be involved in any "cheat." As the court below observed, deceit is the

* The bill as originally introduced is set out with Senator Howard's discussion, at pp. 953-954, Cong. Globe, 37th Cong., 3rd Session. Legislative Committees had compiled much evidence of the existence of transactions in which the Government had been the victim of deceits. *"Government Contracts,"* Report No. 2, 2 Vols., 37th Cong., 2nd Session (1862); *"Government Contracts,"* Reports Nos. 49 and 50, 37th Cong., 3rd Session (1863).

normal content of the words "false," "fictitious" and "fraudulent" when used in the juxtaposition of the statute (R. 268). There is no reason to suppose that the content of the words differs in the several clauses of the statute. The Circuit Court found that there was no misrepresentation express or implied on which to base the conclusion that there was deceit in this case (R. 268).

(b) The statute has been construed as being limited to deceitful practices.

Until the spate of cases which began with the verdict for plaintiff in *Marcus* v. *Hess,* the decisions under the Informer's Act were few and far between. It has rarely been necessary for the courts to construe the specific wording of statutes stemming from R. S. §5438; in most cases it was quite plain that the conduct involved fell within or without any reasonable construction. There are two cases (other than the decision in this case), both decided by the same judge, which hold that the element of deceit is required thereunder. *United States* v. *Goggin,* 1 Fed. 49 (C.C.E.D. Wis., 1880); *United States* v. *Green,* 26 Fed. Cas. 32, No. 15,257 (C.C.E.D. Wis., 1879).

In *United States* v. *Goggin, supra,* the defendant was indicted under R. S. §5438 upon an allegation that he procured payment from the Government of a pension under a pension certificate procured by him upon false and fraudulent proofs. The objection was raised that the offense was not described with the certainty required by the law of criminal pleading. Following conviction, a motion in arrest was granted. In holding that the defendant was not sufficiently apprised of the nature of the charge against him, the Court said at page 53:

> "It was stated upon the argument that what is alleged in the indictment in regard to fraud in

> obtaining the pension certificate relates to the *evidence* of the offense, and not the offense itself; but it is not the presentation of the claim for payment which makes the offense, it is the presentation for payment of *a false or fraudulent claim,* and as no fraud can be committed but by deceitful practices, the particular deceitful practices by which the fraud is alleged to have been committed, or which makes the claim fraudulent, should be to such extent set forth as to make the fraud appear upon the face of the indictment."

Cf. *Bridgeman* v. *United States,* 140 Fed. 577, 594 (C.C.A. 9, 1905).

(c) The statute should be strictly construed and not set at large or treated as an additional sanction for the anti-trust laws.

In *Marcus* v. *Hess, supra,* this Court indicated that the provisions of R. S. §5438, to the extent that they have been incorporated into the Informer's Act, are to be strictly construed, when it said at page 542 (317 U. S. 537, 542):

> "• • • True, §5438 is criminal and for that reason in interpreting so much of its language as it shares in common with §3490 we must give it careful scrutiny lest those be brought within its reach who are not clearly included; but after such scrutiny we must give it the fair meaning of its intendment. • • •"

When the Act is so scrutinized it seems plain that it is to be construed as limited to conduct involving deceit. Any argument that the word "fraudulent", as used in the Informer's Act, has an unlimited significance would render unnecessary the inclusion in the statute of the

words "false" and "fictitious". On the other hand, familiar canons are given full effect when the words, "false, fictitious or fraudulent", or two of them, appearing together, are interpreted in the sense of deceit, which is their common denominator. *Cf. Seven Cases* v. *United States,* 239 U. S. 510, 517 (1916).

The first and second clauses of the Informer's Act refer to individual conduct involving the knowing use of false, fictitious and fraudulent claims and documents; the third clause brings in, not a wholly new class of offenders but only those who enter into agreements to defraud by obtaining the payment of false or fraudulent claims. The construction to be given to the third clause must, obviously, be consistent with that given to the others since they were all part of the same legislative plan for combatting closely related evils.

Unless the entire statute is construed in accordance with normal usage and common understanding, so that the citizen may be fairly warned of the conduct which is denounced, many difficulties arise. The broad and unconfined construction contended for by the Solicitor General would necessarily set the several provisions at large. Once the familiar meaning is abandoned to meet a hypothetical case which may never arise or which, if it arises, is very likely to involve evidence which would satisfy the normal requirements of the statute (as did the evidence in *Marcus* v. *Hess, supra*), the statute loses all quality of certainty. Such a construction imperils persons whose dealings with the Government in good faith may subsequently be brought into question on any ground, and introduces elements of indefiniteness which, in a penal statute, might raise grave doubts as to its validity. *Herndon* v. *Lowry,* 301 U. S. 242, 261 (1937); *United States* v.

Cohen Grocery Co., 255 U. S. 81, 89 (1921). Cf. *A. B. Small Company* v. *American Sugar Refining Company*, 267 U. S. 231, 239 (1925).

No such construction is needed to strike at genuine frauds, recognized and abhorred by all, the statute reaches them under the construction below; a construction going beyond such frauds, involves the importation into the statute of new standards and policies, the creation of new and unfamiliar offenses. Such expansion of the legislative scheme is appropriate only for legislative action where alleged evils may be considered in the light of actual conditions and the policy of changing rules prospectively and not retrospectively can be weighed. If the protection now afforded to the Government by the intricate forms and close supervision used by the Government's expert purchasing officers, the renegotiation laws and the other safeguards against abuses are now inadequate to take care of the hypothetical cases which appear to concern the Solicitor General, Congress should be asked to consider plugging that gap (Brief *amicus curiae* in support of the petition, p. 6). But the gap, if any, ought not to be filled by straining and remolding this statute on the basis of anything in this record or before the Court.

An unlimited construction which, without previous fair warning, introduces grave uncertainties into the dealings between the Government and its citizens, ought to be avoided. In *United States ex rel. Edelstein* v. *Brussell Sewing Machine Co. Inc.* (S. D. N. Y., so far unreported; printed as Appendix C), Judge Bright granted a motion for summary judgment to the defendants in an informer's suit on September 15, 1943, considering that *Marcus* v. *Hess, supra,* was inapplicable. In connection with this question of construction of the statute, Judge Bright said:

"* * * Nor, I believe, was it the intention of the statute to make dealings with the Government hazardous, should some one later conceive the notion that the Government had paid or contracted to pay too much. Certainly, under the circumstances shown here, there would be no fraud, as between merchants, manufacturers or buyers. On the Government side were presumably expert and informed procurement officers. The Government has received what is contracted for. And the only claim shown was for the stipulated price. If such transactions are within the condemnation of the statute, however construed, no one dealing with the Government could rely on any official's decision, no contract price would be final; in fact no contract would be of any value. Price and contract, and the informed judgment of purchasing officers, would always be subject to be set aside by informers at any time, upon claims of fraud such as here presented, and perhaps with even less semblance of merit."

Here the United States has had the benefit of the improvements in military optical instruments made possible by the arrangements between Zeiss and Bausch & Lomb. There is no evidence that the Government has paid excessive prices; the contrary appears from respondents' affidavits (R. 27-30). The purchase through Bausch & Lomb of Zeiss sample instruments (R. 28), the Zeiss patents in the military optical instrument field, the early encouragement to Bausch & Lomb so that the Government would have the benefit of a domestic source to which Zeiss technique was available (see footnote**, *supra*, p. 32), all point to the fact that the Government was not unaware of the substance of those arrangements. For this statute to be so construed, without any previous warning, as to

embrace old and long since terminated arrangements like those here involved, would be obviously unfair. Elements of doubt and suspicion would be created, reaching far beyond this case, at a time when no public interest could possibly be served by that result. The public interest is adequately protected by the decision below, for it is difficult to conceive of an actual conspiracy to stifle competitive bidding where the additional factor of misrepresentation could not be shown as it was in *Marcus* v. *Hess, supra.* No such conspiracy is reflected in this record.

The petition suggested that this statute should be construed as broadly as possible to provide an additional sanction for the anti-trust laws, the sanctions of which petitioners conceived to be inadequate. Any contention that the construction of the agreements by the court below, based on the charges in the anti-trust case, brings them within the Informer's Act is at bottom but another form of the same suggestion. The Informer's Act was passed long before the anti-trust laws were adopted. A penal statute cannot be extended by intendment to an offense not *in esse* at the time of its enactment. *Commonwealth* v. *Exler,* 243 Pa. 155, 89 Atl. 968 (1914). "And it was long ago ruled that a penal Act of parliament cannot be extended to things that did not exist when the Statute was made" *Commonwealth* v. *Wells,* 110 Pa. 463, 468, 1 Atl. 543 (1885). As late as 1941 an attempt was made to increase the penalties imposed by the anti-trust laws, and Congress has refused to enlarge them.* On the other hand this Court has said:

* Sen. O'Mahoney in 1939 sponsored a bill (S. 2719, 76th Cong., 1st Sess.) drastically to increase the civil and criminal liabilities for anti-trust infractions. The text of this bill is set out and discussed on page 8191 *et seq.* of the Congressional Record (76th Congress, 1st Session). This is the bill which was recommended for passage by the T N E C Report of 1941 (Cf. Petition for certiorari, p. 24). So far it has failed to pass either House.

> "The recent expressions of this court in *Tigner* v. *Texas*, 310 U. S. 141, 148, 149, warn that it is not for the courts to indulge in the business of policy-making in the field of anti-trust legislation. Congress has not left us at large to devise every feasible means for protecting the Government as a purchaser. It is the function of Congress to fashion means to that end, and Congress has discharged this duty from time to time according to its own wisdom. Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress." *United States* v. *Cooper Corp.*, 312 U. S. 600, 606 (1941).

Far from showing a disposition to enlarge the penalties for anti-trust violation or to extend the Informer's Act, Congress has recently indicated its determination to restrict the operations of informers. Repeal of the informer provisions was requested by the Attorney General in a letter to the Speaker of the House dated August 28, 1942 (included in House Report No. 263, 78th Cong. 1st Sess.). The House passed a bill (H. R. 1203) to abolish such suits. The bill was amended in the Senate and was adopted on September 17, 1943 (H. R. 1203, as amended by Senate, see Congressional Record, 78th Congress, 1st Sess. (p. 7699). The effect of the amendments in the Senate is to deny informers the right to bring suits where they have no original information. The debates in the Senate reflect deep concern over the abuses which the recent multiplication of suits under the Informer's Act have involved (See Congressional Record, 78th Congress, 1st Sess., pp. 7652-7661, 7678-7699). At this writing, Conference Committees have been appointed by both Houses to compose the differences between the House and Senate versions of the bill. It clearly appears that members of

the House and of the Senate have recognized that proceedings on the part of the United States are properly to be conducted by the Department of Justice, that informer's zeal has grave vices. With this policy in mind, it cannot be regarded as without significance that, in this case, the authorized representative of the Anti-trust Division stated that no charge of fraud was involved in the transactions covered by the anti-trust indictment and that no proceedings by the Government charging fraud were ever taken. The Government was not hindered from making such charges by premature informer's action; this suit was brought a year and a half after the composition of differences between these respondents and the Anti-trust Division. Government counsel made no attempt to intervene or interest themselves in this suit until the petition for certiorari was filed and they apparently did so then only because of their concern with what the court below said in its opinion.

As we have already indicated, that opinion properly interposed was correct. But even if anything in the opinion is not accepted here, the respondents are nevertheless entitled to an affirmance for, on this record, summary judgment for them was right.

CONCLUSION

The decision below affirming summary judgment for respondents was correct and should be affirmed.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
Counsel for Respondents,
Bausch & Lomb Optical Company, et al.

SIMPSON THACHER & BARTLETT,
ARMAND F. MACMANUS,
ROBERT A. SINCERBEAUX,
EDWARD R. LOOMIE,
Of Counsel.

APPENDIX A

INFORMER'S ACT

Revised Statutes, Sections 3490-3494, 5438

"Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

"Sec. 3491. The several district courts of the United States, the supreme court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

"Sec. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respec-

tive districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

"Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States."

"Sec. 3494. Every such suit shall be commenced within six years from the commission of the act, and not afterward.

* * * * *

"Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who

enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

APPENDIX B

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

28 U.S.C.A. following §723c

Rule 12. *Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings*

• • •

(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

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Rule 15. *Amended and Supplemental Pleadings*

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no

responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

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Rule 56. *Summary Judgment*

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits,

if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion

that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX C

Opinion of District Judge Bright in *United States ex rel. Gertrude Edelstein* v. *Brussell Sewing Machine Co. Inc. et al.* (Civil Action 20-492 S.D.N.Y., Sept. 15, 1943.)

The defendants Brussell Sewing Machine Co. Inc., and Alan Mehler (the only defendants served) move to dismiss the complaint as failing to state a claim, or for summary judgment. The action is brought under the False Claims Statute, also known as Informers Act (R. S. 3490-3493 Sec. 31 U.S.C.A. 231-234) to recover double damages and costs alleged to have been suffered by the United States by defendants' fraud in obtaining Government contracts for the manufacture of torpedo parts.

The complaint alleges that pursuant to a conspiracy to defraud the United States, between November 1941 and the beginning of the action, the defendants to induce the United States Naval Torpedo Station to award contracts to the Machine Company, submitted bids in which the Machine Company represented that it was a manufacturer, set forth the price at which it would manufacture the parts, and represented its costs of manufacture and its profit estimated at 6%; that the representations were false, fictitious and fraudulent in that (a) the Machine Company did not intend to manufacture the parts but to subcontract therefore, (b) the costs set forth in the bid were more than twice the fair and reasonable costs of manufacturing and the Company's true estimate thereof, and (c) the anticipated and actual profit was more than 100%. It is further alleged that the contracts were awarded in reliance upon the bids and representations; and from time to time the Machine Company submitted bills for payment, which were certified as just and correct,

but which were false and fraudulent by reason of the facts set forth in a, b and c, and such bills were paid by the United States in reliance upon said statements.

It is to be noted that the only claim of fraud is in the bidding. It is not alleged that the bids were collusive, that the contracts were not fully performed, or that the parts delivered were in any way defective or deficient or not in accordance with the contract in quality, quantity or otherwise.

The statute upon which this action is based provides, insofar as material, as follows:

> "Any person not in the military or naval forces of the United States * * * who shall make * * * or present * * * for payment * * * to or by any person or officer in the * * * naval service of the United States, a claim upon or against the Government * * * knowing such claims to be false, fictitious or fraudulent, or who, for the purpose of obtaining * * * payment * * * of such claims, makes * * * any false bill * * * certificate, affidavit or deposition * * * or who enters into any conspiracy to defraud the Government * * * by obtaining * * * payment * * * of any false or fraudulent claim * * * shall forfeit and pay to the United States the sum of $2,000., and, in addition, double the amount of damages which the United States may have sustained * * *".

The contracts obtained by the Machine Company, nine in number, have been submitted to me. Their inspection was denied the plaintiff because of a clause in them that they should be treated as confidential and the contractor is prohibited from divulging any information whatsoever

concerning the work under the contract to any unauthorized person.

All of them are practically identical in terms. They provide, in part, that the emergency will not permit delay incident to advertisement for competitive bids; that the contractor has an organization, plant, and facilities of sufficient capacity for doing the work; that the contractor will repair or replace any damage due to faulty material furnished by the contractor or his sub-contractor; that no alien in the employ of the sub-contractor shall have access to the plans or work or participate in the contract trials, without the written consent of the Secretary of the Navy under certain conditions; and that each subcontract shall include the National Defense Contract Clause, which, among other things, excludes any person designated by the Secretary as undesirable.

It is clear that subcontracting could not be the basis for any charge of fraud. This was conceded by the plaintiff upon the argument. It is now claimed that the representation that the Machine Company would manufacture, when it did not intend to do so, was one of the misrepresentations, but it is not shown that it did so state, and its contract is otherwise; and in any event it is shown by the moving papers that it did manufacture some or all of the parts and subcontracted other portions. Its contract was that it had the organization and facilities to do the work, and there is express provisions governing subcontracting.

The price agreement and certificate on preliminary negotiations, attached to the contracts, contain a clause showing a price analysis which is obviously an estimate, and is so stated to be, and which contains an "allowance

for profit" and a "total cost of production." Alongside of it is a column, not filled out in the copies furnished to me, entitled "Government Estimate" and in the third column is the "Accepted Price." It is stated below there that "The prices accepted and mutually agreed to are considered to be fair and reasonable." It is shown without contradiction that the parts contracted for had previously been made by the Navy and it would therefore, be cognizant of their cost of manufacture. Instances are proven where bids of the Machine Company had been rejected because, after comparison with manufacturing costs at the Naval Station, the prices were found to be higher than the Navy's price.

The profit was also estimated, and if the costs were known by the Navy from its own manufacturing, it also knew the costs. It is clear that the estimate could not be accurate as to costs and profit, in view of the emergency and the consequent upsetting of labor and material markets. Even if the estimated profit can be said to have been far below the actual or anticipated return, I can see no basis of fraud. And it is certain that any excessive profits may be recaptured by the Government upon renegotiation under the Revenue Act of 1942, Chap. 619, Sec. 801, Title 8 relating to renegotiation of war contracts, effective April 28, 1942.

It is shown that in a letter dated April 1, 1943, from the Navy Department to the Machine Company, the Chairman of the Price Adjustment Board wrote in part:

> "The Secretary of the Navy • • • has determined that your profits under said contracts and subcontracts can be determined with reasonable certainty for all fiscal periods up to and including

> December 31, 1942 * * * Based on the facts disclosed by such negotiations, it has been found * * * that under said contracts and subcontracts, you have realized no excessive profits * * *"

It is true, however, that after the making of this motion, and obviously after plaintiff's counsel had been informed of that ruling, and after written and oral communication by him, the Machine Company on May 22, 1943, was notified that renegotiation would be reopened.

I am not convinced, however, if an excessive profit were made upon the contracts, that would be a fraud under the circumstances shown here.

And, finally, I do not think the law under which this action is brought was even intended to include the situation here revealed. There was no collusive bidding, nor any conspiracy between the defendants and a government official, nor any failure of performance. So far as appears, the parties dealt at arm's length, neither dependent upon the other, nor influenced by their statements. The government officials were cognizant of how to manufacture the parts and the cost. The defendants were pioneering in new fields to devote their civilian plant and organization to the war effort. They submitted bids which the government could and did accept and reject. It was clearly not the intention of the statute to condemn transactions because the parts could have been obtained more cheaply under the circumstances. Nor, I believe, was it the intention of the statute to make dealings with the Government hazardous, should some one later conceive the notion that the Government had paid or contracted to pay too much. Certainly, under the circumstances shown here, there would be no fraud, as between merchants, manufacturers

or buyers. On the Government side were presumably expert and informed procurement officers. The Government has received what it contracted for. And the only claim shown was for the stipulated price. If such transactions are within the condemnation of the statute, however construed, no one dealing with the Government could rely on any official's decision, no contract price would be final; in fact no contract would be of any value. Price and contract, and the informed judgment of purchasing officers, would always be subject to be set aside by informers at any time, upon claims of fraud such as here presented, and perhaps with even less semblance of merit.

In the last analysis, the foundation of plaintiff's claim of fraud is excessive profit and the alleged concealment of sub-contracting. There is no basis for the latter, and the Government could not be damaged by the former in view of the Renegotiation Act.

The cases of *U. S. ex rel. Marcus* v. *Hess* (317 U. S. 537; 87 L. Ed. 374) and *U. S.* v. *New Orleans Chapter* (U. S. ; 87 L. Ed. 387) are not to the contrary. In each there was collusive bidding among the several contractors by which all possible competition was removed, which did not exist herein.

The motion for summary judgment is granted, without prejudice to any rights of the United States, with costs; settle order on notice.